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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

FRANK ARENA,

Petitioner,

—v.—

LUCKENBACH STEAMSHIP COMPANY, INC.,

Respondent,

—v.—

AMERICAN STEVEDORING CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Frank Arena, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, made and entered May 11, 1960 (Appendix D) affirming a judgment of the United States District Court, District of Massachusetts, made and entered on October 23, 1959 (R. 109) after a directed verdict for the Respondent at the close of Petitioner's case.

Opinions Below

The opinion of the District Court (being a statement to the jury why the Court granted Respondent's motion for a directed verdict) does not appear in the Official Reporter; it is appended hereto and marked Appendix A. The opinion of the Court of Appeals for the First Circuit is reported in 279 F. 2d 186; it is appended hereto and marked Appendix B. The opinion of the Court of Appeals for the First Circuit denying the petition for rehearing at this time has not been reported; it is appended hereto and marked Appendix C.

Jurisdiction

The judgment of the United States Court of Appeals for the First Circuit sought to be reviewed was made and entered May 11, 1960 (R. 116). On May 23, 1960 the mandate was stayed until further order of the Court (R. 117). On May 25, 1960 Petitioner, petitioned for rehearing (R. 119-121). On June 10, 1960 the United States Court of Appeals for the First Circuit in an opinion, denied the petition for rehearing.

The jurisdiction of the Court below was based on 28 U. S. C. Sec. 1291.

The jurisdiction of this Court to review by writ of certiórari the judgment complained of, is conferred by 28 U. S. C. Secs. 1254(1) and 2101(c).

Questions Presented

In a longshoreman's suit against a shipowner based on unseaworthiness and negligence, for injuries sustained, while doing the traditional work of a seaman, loading

cargo in the square of the hatch, when he was struck by rolls of paper (ship's cargo), which fell from a cargo board and its attachments (the property of the stevedoring contractor) on the mere tipping of the board, as it was being brought aboard by means of the vessel's appliances and the stevedore who was loading the ship, the following questions are presented to this Honorable Court.

1. Where a stevedoring contractor employed to load a vessel supplies a cargo board and the nets attached to the ends of the board are of insufficient length to secure the rolls of paper, so that there is nothing to prevent them from falling off the ends of the board, did the vessel breach its obligation of seaworthiness to the Petitioner?

2. Assuming that the nets at the ends of the same cargo board are of sufficient length to secure the rolls of paper, but are not tied by Petitioner's fellow longshoremen who made up the draft of cargo, did the vessel breach its obligation of seaworthiness to the Petitioner?

3. Where the Trial Court refused to receive proof of the use and merits of another type of cargo board, holding the one supplied by the stevedore which failed, to be reasonably fit, did not the Court deny the Petitioner the right to a seaworthy appurtenance of the vessel?

4. Where the ship's officers knew or should have known that the stevedore was bringing aboard the rolls of paper unsecured to the cargo board, did the shipowner breach a duty of care owing to the Petitioner?

5. Did not the District Court err in directing a verdict for Respondent, for in a longshoreman's suit against a shipowner, is not the "test of a jury case", the same as that pronounced by this Court in a seaman's case (*Ferguson*

v. *Moore-McCormack Lines, Inc.*, 352 U. S. 521), " * * * whether the proofs justify with reason an inference that * * * " the negligence of the shipowner or the unseaworthiness of the vessel " * * * played any part even the slightest in producing the injury or death for which damages are sought"?

There Are No Statutes Involved

Statement of the Case

On April 1, 1957 the MATTHEW LUCKENBACH lay docked at the Port of Boston and Respondent, Luckenbach, owner and operator of the ship, employed American Stevedoring Corporation, Respondent, to discharge and to load cargo aboard the vessel (R. 23, 12, 51. Appendix B 19, 20, 24). Petitioner, a longshoreman in the employ of American Stevedoring Corporation (R. 32), was working in one of the forward deep tanks in number 2 hatch illustrated in Plaintiff's Ex. 1 (R. 97, 44, 45, 68), loading cargo (R. 45, 46), when he was struck by rolls of paper which fell out of a draft of cargo coming aboard when the cargo board tipped (R. 30, 46, 48, 70).

The case was tried by a young, inexperienced attorney; the record shows he had difficulty eliciting the proof, that he was restricted in offering proof by the Trial Court (R. 24-28, 43, 48, 57-60), and that he was not familiar with the law involved (R. 85-92).

The stevedoring contractor, American Stevedoring Corporation, supplied the cargo boards for transporting the cargo from the dock to the ship (R. 42, 52, 53). The board which tipped was of the same design and construction as the board indicated in Plaintiff's Ex. 2 (R. 99, 18). The board was eight feet long and five feet wide (R. 42, 67). Attached to each side of the board was a rope lanyard

which was secured to the board by means of two shackles, one located near each end (R. 99, 47); the lanyard ropes necessarily extended from the two shackles in triangular fashion as they were joined by a ring bolt illustrated in Plaintiff's Ex. 2 (R. 99). The length of the lanyards was not established. The ring bolt of each lanyard was secured to the cargo hook, thus the lanyards on each side of the cargo board were the sole means of supporting the board and its cargo. Plaintiff's Ex. 2 (R. 99, 15, 16). At each end of the cargo board there was a rope net illustrated in Plaintiff's Ex. 2 (R. 99), the length of the nets was not established. The purpose of the nets was to secure the cargo to the board (R. 63, 69).

The board had a load of five rolls or packages of paper; each was about 2½ feet in diameter, five feet long and weighed about 500 pounds (R. 18, 19). There were three separate rolls of paper in each package or roll and each of them weighed about 180 pounds (R. 31, 32). Similar rolls or packages though not completely intact because of damage to the outer wrapping paper are shown in Plaintiff's Ex. 4 (R. 103, 31); the same exhibit shows the three rolls in each package; but the packages are on a pallet and not a cargo board and they are in a vertical position rather than the position in which they were loaded (R. 31, 32). Then three packages or rolls rested on the cargo board so that the axis of each roll was at right angles to the sides of the board; two rolls lay in the same manner on the top of the bottom three (R. 67, 68, 78). Obviously they would not be loaded on the board in any other way.

The rolls of paper were loaded on the cargo board on the dock by Petitioner's fellow longshoremen (R. 55, 59, 60). The load was brought aboard by means of the ship's booms and winch which controlled the movement of the wire fall leading to the cargo hook which went into the

ring bolt in each lanyard on the cargo board (R. 13-16, 68-71). The winch controls are shown in Plaintiff's Ex. 3 (R. 101, 71). In the vicinity of the hatch coaming the cargo board tipped up and the rolls fell off the board, some struck the separator between the deep tanks breaking the package and Petitioner was struck by two of the rolls in the package (R. 29, 30, 46, 69, 70, 77).

The shifting of the two top rolls caused the board to tip and spill the rolls (R. 69, 70). There is no direct proof of the cause of the shifting of the top rolls; it may have been caused by a winch "a litfle faster than usual" (R. 71, 72), for the load was swinging when it came aboard and it was necessary for the winchman to steady it twice before it tipped up at the hatch coaming (R. 28, 29). When the board tipped there was nothing to prevent at least the top two rolls from falling out of the draft because the nets at each end of the cargo board did not go over them (R. 69, 70). While the longshoreman on the dock who set up the draft testified that the load was in "proper condition" with the nets tied, he did not testify that the nets went over or secured the two top rolls (R. 63). There is not a scintilla of proof that the nets were sufficiently long to cover or secure the two top rolls. As thirty similar drafts came aboard prior to the occurrence with the two top rolls uncovered and unsecured by nets (R. 37, 38, 70), it is a fair inference that the nets were too short to secure the two top rolls.

There was another type of cargo board with the lanyards at the ends of the board and a raised curbing or cargo stopper at each end of the board, illustrated in Plaintiff's Ex. 6 (R. 107, 47). This the Court of Appeals referred to as a "can" or "end" board and it referred to the board in use with the lanyards on the sides as a "side" board (Appendix B 20). It was the side board and not the end board which was used to discharge canned goods in addition to rolls of paper (R. 47, 75, 76). While there was some un-

certain proof that it was customary to use the side board for loading rolls of paper (R. 46-48, 75, 76), the Trial Court excluded proof, that there also was "a different set of boards" for loading paper (R. 24, 25), that the end board was or was not available (R. 43), that the end board had been used for loading roll type paper (R. 48), that the end board, was a safer and better appliance (R. 57-60). Thus the availability, use, merits and construction of the end board, save for its photograph, Plaintiff's Ex. 6 (R. 107) was excluded.

The photograph of the end board shows that each end had a stopper or curbing designed to prevent slippage of cargo, particularly rolled cargo which moves freely, and that the lanyards, which restrain the cargo as well as hold the board (R. 48), were shackled to the ends of the board rather than to the sides. As the draft of cargo was brought in "aburton", so that the ends of the cargo board moved across the ship at a right angle to her keel or center line, the danger arose from the tipping of the ends of the board—the direction of movement—for "a load swings as it rides" (R. 22) and the danger of end tipping obviously increased as the rolls of paper lay on the board with their axis parallel with the ends of the board and the direction of movement (R. 67, 68, 78).

The Court of Appeals upholding the use of the side board, said the lanyards prevented "longitudinal slippage" (Appendix B 21), that is the slippage from the sides of the board. As the two lanyard ropes on each side of the board rose to form the apex of a triangle, it is obvious that the lanyards could not prevent side slippage of each of the five rolls because their ends were at the sides of the board and the lanyards could not press against all five ends. As the draft came in "aburton" the danger was not from side slippage of the cargo, but from end slippage and the lanyards on

the end board could prevent such slippage because the sides of the rolls were parallel with the ends of the board, so that it was only necessary for lanyards so placed to press against the bottom and top roll at each end of the board, the center roll was held by the pressure of the lanyards against the end rolls.

The ship had been loading paper since 8:00 o'clock the morning of the accident (R. 13-15, 70), bringing aboard the same size loads with the top two rolls unsecured and with the same equipment (R. 55-57, 62, 69, 70). This took place in the presence of the ship's officers and crew (R. 75).

The Court of Appeals concluded that the cargo board was fit for the work, predicated its failure on the negligence of the longshoremen, and did not consider that Petitioner was prevented from proving the use and merits of another board; while admitting that the shipowner might be liable for the unseaworthiness of the board, held that "improper loading" was "not chargeable" to it and thus without considering the matter, in effect, held that it was not liable for the unseaworthiness of the draft of cargo (Appendix B 19-24).

Reasons for Allowance of the Writ

ARGUMENT

Anwering the questions posed in numerical order.

1. As Petitioner was engaged in the traditional work of seamen loading cargo aboard Respondent's ship he had the protection of the doctrine of seaworthiness, *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85; *United New York & New Jersey Sandy Hook Pilots Assn.* v. *Halecki*, 358 U. S. 613. The shipowner's liability for unseaworthiness extends to equipment brought aboard by the stevedoring contractor

and used by it in performing its service of loading and discharging cargo. *Petterson* v. *Alaska S.S. Co.*, 347 U. S. 39; *Rogers* v. *United States Lines*, 347 U. S. 984. The cargo board secured to and operated by the ship's loading and unloading equipment became a vital part of the ship's apparatus; like the wire cargo runner the stevedoring contractor brought aboard in *Rogers* v. *United States Lines* (*supra*), where this Court reversed the Court of Appeals for the Third Circuit, 205 F. 2d 57, it was incorporated in the ship's loading equipment and became an appurtenance of the vessel to which the obligation of seaworthiness attached.

The simple almost primitive cargo board was necessarily traditional ship's equipment. While this Court has never stated that the warranty of seaworthiness extends only to traditional ship's equipment brought aboard by the stevedoring contractor, it has been held that the warranty extends to non-traditional equipment, such as a truck brought aboard by the stevedore, *Considine* v. *Black Diamond Steamship Corporation* (D. C. D. Mass.), 163 F. Supp. 107, and a baggage chute kept on the dock, *DiSalvo* v. *Cunard S.S. Co.* (D. C. S. D. N. Y.), 171 F. Supp. 813. In the interest of mechanical progress and efficiency it would seem sufficient that the appliance is used in work traditionally performed by the ship and her crew.

The seaworthiness of the cargo board and its attachments is to be determined by its "reasonable fitness" for "intended use", *Mitchell* v. *Trawler Racer, Inc.*, 361 U. S. 808. It is unlikely that longshoremen would have had so little regard for the safety of their fellow workers in the hold that they would have left the nets untied on the load that tipped and the thirty previous loads that came aboard the morning of the accident (R. 37, 38, 70), if they could have been secured. It is pertinent that experienced counsel for ship did not establish the length of the nets. In the absence

of such proof the Court of Appeals (Appendix B 23, footnote 4) says, "A photograph in evidence demonstrates them to be approximately 5 feet." Obviously such a conclusion is risky at best; as each roll was 2½ feet in diameter (R. 18, 19) and as the nets would have to be drawn upward from the ends of the board at an angle, because the top two rolls were in from the board ends, the nets would have to be greater than five feet in length to secure the top two rolls.

The two top rolls being free to shift and fall with the movement of the draft, reasonable men might conclude that the cargo board was unfit for its intended use and unseaworthy.

2. Assuming without conceding that the nets were sufficiently long to secure the top two rolls, but were not tied through the negligence of the longshoremen, still the draft was as unfit to board the ship as one having no nets at all. The stevedoring contractor can render a ship unseaworthy not only by bringing aboard defective equipment as in the *Petterson* and *Rogers* cases (*supra*) but by creating an unfit condition with proper ship's equipment, *Grillea* v. *United States*, 232 F. 2d 919 (2 C. C. A.); *Rich* v. *Ellerman* 278 F. 2d 704 (2 C. C. A.). In *Grillea* the longshoreman recovered even though it was his own carelessness in misplacing a hatch cover which later caused his injury. In *Rich* it was held that improper stowage of ship's cargo by the longshoremen made the ship liable to them for unseaworthiness. As liability arises without fault, and solely by reason of an unfit condition created by the misuse of proper equipment by the longshoremen, there is no reason why liability should attach only when the shipowner provides the equipment, for the stevedore's equipment may become an appurtenance of the ship as well, *Petterson* v. *Alaska S.S. Co.*; *Rogers* v. *United States Lines* (*supra*).

In holding that "improper loading" (Appendix B 23) and "negligent use or negligent choice of equipment" (Ap-

pendix C 26) in bringing freight aboard does not render a ship unseaworthy, the Court of Appeals below erred for it failed to consider the draft of cargo an appurtenance of the ship, which when suspended from the ship's boom was probably the most potential hazard above the deck, certainly to the Petitioner and his fellow workers in the hatch. As the liability for unseaworthiness was designed to protect against the hazards arising out of work traditionally performed by seamen, *Seas Shipping Co. v. Sieracki (supra)* it should attach to a draft of cargo even though it be a transitory appurtenance, for it can no longer be urged " • • • that liability for a temporary unseaworthy condition is different from the liability that attaches when the condition is permanent." *Mitchell v. Trawler Racer, Inc. (supra).*

3. While the record is far from clear there was some proof that it was customary to use the "side" board for loading paper in the Port of Boston (R. 25, 48, 57, 76, 79, 81). Customary use of an appliance does not establish its reasonable fitness for the use to which it is put. *Hecht Co. v. Jacobsen*, 180 F. 2d 13 (C. A. D. C.); *Chicago & N. W. R. Co. v. Bower*, 241 U. S. 470. For "What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not.", *Texas & Pac. Ry. v. Behymer*, 189 U. S. 468. So it is proper to show that there is available in the industry another, a better or safer appliance or method than the one claimed to be unfit. *Hecht Co. v. Jacobsen (supra)*; *The T. J. Hooper*, 60 F. 2d 737 (2 C. C. A.). It is then for the jury to determine which if any appliance meets the standard of "reasonable fitness" for "intended use".

Had the Trial Court permitted Petitioner to prove the use and merits of the end board (R. 24, 25, 43, 48, 57 60), a

jury may reasonably have found that it met the test of reasonable fitness and the side board did not (*supra* 6-8). In refusing to permit proof of the use and merits of another type of cargo board (R. 58, 59), the Trial Court placed the stamp of reasonable fitness on the cargo board the stevedore supplied, even though its fitness was supported only by its use and it finally failed. Thus the stevedore's obligation to provide a reasonably fit appliance was virtually abrogated and Petitioner's right to a seaworthy one denied.

4. Petitioner, a longshoreman, had the right to recover for Respondent, Luckenbach's negligence, *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406. Surrender of control to the stevedoring contractor does not immunize the shipowner for its negligence, *Palazzolo* v. *Pan Atlantic S.S. Corp.*, 211 F. 2d 277 (2 C. C. A.); *Crumady* v. *The Joachim H. Fisser*, 358 U. S. 423. The shipowner remains liable for his negligence all during the time the stevedore is in control, he can not stand by and knowingly permit the neglect of the stevedoring contractor to injure its own employees who are lawfully aboard his ship, *Connolly* v. *Weyerhaeuser S.S. Co.*, 236 F. 2d 848 (2 C. C. A.); *Weyerhaeuser S.S. Co.* v. *Nacirema Operating Co.*, 355 U. S. 563.

As the testimony is undisputed that from the time the work began on the morning of the accident until its occurrence 30 similar unsecured loads came aboard (R. 13-15, 70) and that during this time the ship's crew and officers including the mates passed by and "walk around all the time" (R. 75), Respondent, Luckenbach, may reasonably have been found to be negligent by a jury.

5. In cases brought under the Federal Employers Liability Act, *Rogers* v. *Missouri, P. R. Co.*, 352 U. S. 500, and the Jones Act, *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U. S. 521, this Court has repeatedly held that when

negligence " * * * played any part even the slightest in producing the injury or death * * * " that a jury issue is raised. While longshoremen are not covered by either Act, their cause of action against the shipowner for negligence arises out of the General Maritime Law, *Pope & Talbot, Inc.* v. *Hawn* (*supra*). It would be strange indeed if those who are engaged in the traditional work of seamen and are subject to its traditional hazards are to be put to a greater burden of proof.

Unseaworthiness too is a question of fact for jury determination, *Cowan* v. *Inland Waterways Corp.*, 124 F. Supp. 683; *Pope & Talbot, Inc.* v. *Hawn* (*supra*). This Court has never by direct pronouncement fixed the standard of proof required to impose liability for unseaworthiness. As the doctrine of unseaworthiness is part of our maritime law which has received liberal interpretation from this Court and as the issues it raises are interwoven with concepts of negligence under the General Maritime Law and the Jones Act, we believe that a longshoreman has no greater burden in proving unseaworthiness than a seaman has in proving negligence under the Jones Act, *Johnson* v. *United States*, 333 U. S. 46.

On the facts heretofore presented and discussed the negligence of Respondent, Luckenbach, and the unseaworthiness of its vessel should have been submitted to the jury.

CONCLUSION

In holding that a shipowner is not liable to a longshoreman for either negligence or unseaworthiness, where the stevedoring contractor has negligently loaded a draft of cargo or where it has selected its own unsafe appliance to make up the draft, the Courts below have pronounced important rules of maritime law contrary to the principles established by this Court and other United States Courts of Appeal, and thus have impaired the rights of thousands of longshoremen who load and unload vessels every day. As making up and handling drafts of cargo is one of the principal activities of longshoremen and the cargo draft is the most frequent cause of injury, the shipowner's liability with respect to it should be fixed by this Court.

The substantial amount of pending litigation brought by longshoremen against shipowners for negligence and unseaworthiness calls for a pronouncement by this Court of the degree of proof required to establish such a case.

Certiorari should be granted as prayed for.

Respectfully submitted,

GEORGE J. ENGELMAN
Attorney for Petitioner

APPENDIX A

Opinion of the United States District Court, District of Massachusetts

The Court: "Members of the Jury, this was a case in which the plaintiff alleged that the defendant here, Luckenbach Steamship Company, was negligent—I shall try to make as understandable as I can what I have to say to you—towards the longshoremen. Then they alleged that—well, there were several grounds upon which plaintiff said he relied. He claimed a failure to furnish proper and suitable appliances. As I told you during the trial, it was a duty imposed upon the shipowner to furnish the workmen, the longshoremen, with safe and suitable appliances to do the work on board that ship. If they knew or should have known that the appliances here, principally this board we talked about, the cargo board, was not suitable for the purpose for which it was being employed, then of course if the plaintiff's injuries were caused by their negligence he could recover in this case.

Then on the unseaworthiness count, with respect to unseaworthiness the plaintiff does not have to prove negligence but does have to prove that the shipowner failed to have suitable appliances with which to work—the appliance here or the instrumentality, as it is sometimes called, being this cargo board. But the difficulty in the plaintiff's case is that he failed to prove any negligence on the part of the shipowner with respect to the use of this board because, as the evidence came in here, the board was used for years, that type of board was used for years by the steamship—by the stevedores, and also the stevedore owned this board but it was used by the shipowner, and that was the type of board they used for years, and that was the manner in which the paper was (132) stowed or placed on the board when it came into the ship.

So, in order to make that claim for unseaworthiness understandable to you, there was no evidence here to show that the board was defective in any way, no evidence here to show that a rope broke in any way, no evidence at all to show any defective equipment in any way.

The mere fact that the board tilted and the rolls came off might have been due to a great many causes, other causes that the shipowner would not be liable for.

Let me illustrate that. These cases are a little complicated. We had a claim by the plaintiff against the shipowner for negligence. That claim was that the shipowner did not use reasonable care with respect to the appliances they furnished the plaintiff to work on. The unseaworthiness count was practically the same thing, except the duties involved are a little different, that they failed to furnish a seaworthy, a safe and suitable board for him to work on.

Well, when the suit was brought by Arena against Luckenbach, Luchenbach said, "Well, this material was furnished by the stevedore. They brought it on board. It was the employees of American Stevedoring that were working at the winch, loading it and unloading it, in the hold."

Now there was a duty upon the American Stevedoring Company to perform this work in a safe way. In order to make it simple and understandable, Luckenbach said, "If I'm stuck, if Luckenbach is stuck, if a verdict comes in, and we have to pay any damages because of this unsafe or unsuitable equipment, then we have a claim against the stevedore because the stevedoring company promised to do this work in a safe way."

Now I think you ought to know this, that this is conjecture on my part. How did this board tilt? We have no evidence in this case that would tell us why or how. Well, we did have some evidence as to how it tipped. It tipped forward. We had no evidence as to why it tipped. Was it in the winch? Well, the witness said he operated it in the

normal way. Was it because the load was tied imperfectly when it left the dock? Was it the result of the five rolls that it was the custom to place on the cargo board, that they were improperly or insecurely placed on the cargo board?

If the rolls were placed insecurely on the cargo board or improperly loaded on the dock to be swung into the vessel, that negligence would be the negligence of the stevedoring company and could not be charged up to the ship. All that could be charged up against the ship would be the use of an improper appliance, and I have talked about that.

Suppose there was some evidence, and I don't think there was any, I don't remember any evidence that the load was improperly tied on the board on the dock, or that it was improperly placed on top of the board, three on the bottom and two on top, but suppose there was evidence with respect to that, and it was the negligence of the stevedores on the dock, or on the ship, that caused this accident. The plaintiff could not recover against the stevedore for any negligence towards him. Why? Because the longshoreman is entitled to workmen's compensation for such an injury as that and is barred from suing his employer, the stevedore. In this case the plaintiff was paid Workmen's Compensation for his injuries. It was stopped when he brought suit in this case against Luckenbach, and Luckenbach impleaded, as we call it, or brought in the American Stevedoring Company. But the workman now can go back and make his further claim against the American Stevedoring Company and have resumed the compensation he was being paid at the time he brought suit.

I thought I would tell you about that aspect of the case. We do not have that mentioned when the case is being tried because the jury might think, "Well, he is getting paid any way. We are not going to give him any money." In

my Court there is excluded evidence of the fact that he has been paid and will be paid compensation for all of the time he was laid up in accordance with the Compensation Act.

So I daresay, although I am not encouraging it, that the American Stevedoring Corporation can expect this plaintiff to go back, to return and ask for further compensation for the time after he stopped getting it, when the suit was brought, up to the end of the disability.

Well, to sum the whole thing up, the plaintiff has failed to prove that there was any negligence here on the part of the shipowner, and the plaintiff has failed to prove that there was anything the matter with this cargo board that had been used there for years, for five or six years, and the plaintiff cannot recover against the shipowner. Consequently the case against the Luckenbach Steamship Company falling, then of course the claim of Luckenbach against American Stevedoring Company falls with it, too" (R. 92-95).

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 5601

FRANK ARENA,

Plaintiff-Appellant,

—v.—

LUCKENBACH STEAMSHIP COMPANY, INC., *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the District of Massachusetts.

Before:

WOODBURY, *Chief Judge*, and
HARTIGAN and ALDRICH, *Circuit Judges*.

GEORGE P. DONOVAN, *for appellant.*

LEO F. GLYNN, *for Luckenbach Steamship Company, Inc., appellee.*

Opinion of the Court

May 11, 1960

ALDRICH, *Circuit Judge*:

This is an action brought by a longshoreman injured in the port of Boston while engaged in loading a vessel owned

by the defendant. The loading operations were in the sole control of a stevedoring company, plaintiff's employer.[1] The plaintiff was injured when a loading board tipped and spilled rolls of paper into the hold. The complaint alleges negligence in the failure to supply a safe place to work and in supplying defective loading equipment. It also alleges unseaworthiness, again, the allegedly defective loading equipment. At the close of plaintiff's case the court directed a verdict for the defendant. The plaintiff appeals.

There was no conflict in the testimony. On the morning in question the vessel was simultaneously loading and unloading cargo. The plaintiff was at the bottom of one of the number 2 hatch "tanks." The hatch was serviced by two winches. The after winch was engaged in discharging canned goods, and the forward one in loading rolls of printing paper. The cargo in each instance was carried on boards. The boards for paper were 5′ wide and 8′ long, suspended from two slings, or lanyards, fastened on the sides at points somewhat in from the corners. The can boards were suspended from the ends. We will call these boards, for want of a better term, side-boards and end-boards, respectively. Although the record is not altogether clear, apparently for as long as any witness could remember it was customary in the port of Boston to use side-boards for loading rolls of paper of this type, and end-boards for various other purposes. There was no evidence of any previous failure. These particular rolls were about 2′ 2″ in diameter and 5′ long. Five rolls, as was "the usual custom in the port of Boston," were placed upon a board—a layer of three, and on top of that, a layer of two. Nets permanently attached to each end of the board served, when tied across one to the other, to keep the rolls from rolling

[1] This company was named as a third party defendant, but did not participate in the appeal, and is not referred to in this opinion as a defendant.

off. Longitudinal slippage of the rolls was contained by the sling, or lanyards, from which the board was suspended on each side.

The loading equipment of the vessel consisted of a fixed derrick, or pole, from which two booms were suspended, one stationed inshore, and the other "offshore," over the hatch. There was a winch, with a separate control for each boom. Movement of the cargo from shore to ship was effected by taking up on the offshore falls and slackening on the inshore. The winch was electric, with three speeds each way. Prior to the accident some thirty loads had been brought aboard without incident. Three longshoremen who were on deck at the time testified about the one in question. The first said that as the board came aboard, "it looked like as if it was tipped a little." The second said it was "swinging a little." According to this witness, the winchman "steadied the load on deck to take the swing out of the load. When he had it steadied he started down the hold again. He steadied it again over the hatch and then the load tipped up." All of the rolls rolled out. There was no evidence that any equipment failed, and no one testified, hypothetically or otherwise, as to what caused the upset.

The defendant having had nothing to do with the loading of the vessel, liability depends upon proof of defective or improper equipment. The only testimony as to the winch came from the third witness, the winchman. He stated that "it was beautiful." He added that it ran "a little faster than usual." When asked what he meant by this he said he was referring to high speed only. He did not characterize this speed as excessive, but repeated that the winch was "beautiful." Even if this speed could be thought to be a defect, the witness was not asked, and there was no

[1] No witness was called who had loaded the board, or who had seen it being loaded.

testimony from which it could be gathered, what speed or speeds the winch had been operated in with respect to this particular load. For all that appears, high speed was used only when the board was light. Nor was there any suggestion that it was unusual for a load to swing a little or tip a little, or that the rate of speed, in high or otherwise, had been the cause of such movement. Although the burden upon a longshoreman to establish causation is not heavy, there must be some evidence that whatever might be claimed to be a defect in the vessel had some connection with the occurrence. The defendant, on this record, could not be charged simply because high speed on this winch was faster than on some others.

The plaintiff bases his attack principally upon the board.[1] There was no evidence that this particular board was damaged or defective. Nor were its lanyards or nets. The board, with its appurtenances, continued to be used for further loading. Apparently, not even any net lines had been injured. Although no witness testified directly what caused the accident to occur, we believe it can be deduced. When the winchman was asked whether he observed anything about the load as it was coming in, he stated, "This was one thing I noticed. The net. They had three bales on the bottom and two on the top . . . This net here had three rolls on the bottom; for two nothing was on them to hold them . . . and these two bales on top they shifted on me . . . The board went up straight and down like that." In other words, with no fastening over the top rolls, and the nets partly filling the spaces between the bottom rolls which would normally help retain them, the top rolls were free to shift, which would further unbalance the board, and ac-

[1] Boards are stevedore's property. We assume, without deciding, that the obligation of seaworthiness applies to equipment such as this, if used for performing a regular ship's function, even though not customarily ship's property. Cf. *Considine* v. *Black Diamond S.S. Corp.*, D.C.D.Mass., (1958), 163 F.Supp. 107.

centuate the movement with the eventual result. In view of the fact that even the bottom layer of rolls came out and the nets were not found to be injured after the accident, it may well be that the nets had not been tied at all, but were simply held over the bottom rolls by the weight of the top ones until their shifting released the tension. In any event, the improper loading was not chargeable to the defendant.[1]

The plaintiff's contention, which is purely counsel's suggestion, as no witness so testified, is that so-called end-boards would have prevented this accident, and that the vessel was accordingly unseaworthy. There are two answers to this. In the first place, if the lanyards had been at the ends instead of at the sides of the board, there would have been no protection against end-wise slipping of the rolls. The nets were there to guard against roll-offs. The board was not defective simply because the longshoremen who loaded it neglected to do so in the proper fashion. Secondly, even if it could be found that end-boards rather than side-boards should have been used, the choice of side-boards was the stevedore's. There was no evidence of unavailability of end-boards. If anything, the record suggests the contrary. A vessel is not unseaworthy simply because the improper type of equipment was used by someone unless, also, it appears that the proper type was unavailable. In the ice cream case, of which plaintiff makes much, the waiter's use of a knife was forced upon him by

[1] In his brief plaintiff states that the nets were only 2 feet long. There is no testimony from anyone as to the length of the nets. A photograph in evidence demonstrates them to be approximately 5 feet long, even when not stretched taut. We could not say that they could not go to the top of the top layer. There was no direct testimony that they could, or could not, but the fact that the winchman spoke of noticing that the nets were only over the bottom rolls and that the top rolls were free indicates that this was not customary.

the absence of the proper tool. *Ferguson* v. *Moore-McCormack Lines*, 1956, 352 U. S. 522.

Before concluding, we wish to speak of the pleadings. Except for an admission that the defendant was a foreign corporation doing business in Massachusetts, and an allegation of lack of knowledge as to the citizenship of the plaintiff, the defendant's answer denied every allegation in the complaint. F. R. C. P. 11 provides in part, "The signature of an attorney constitutes a certificate by him that he has read the pleading; [and] that to the best of his knowledge and belief there is good ground to support it. . . . For a willful violation of this rule an attorney may be subjected to an appropriate disciplinary action." It is difficult to believe that counsel who signed this answer had good grounds to assert, among other things, that his client did not either own, operate or manage the vessel, that the plaintiff was not employed by the stevedore, and that he was not injured, or even aboard the vessel. It is a breach of counsel's obligation to the court to file an answer creating issues that counsel does not affirmatively believe have a basis.

Judgment will enter affirming the judgment of the District Court.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 5601

FRANK ARENA,

Plaintiff-Appellant,

—v.—

LUCKENBACH STEAMSHIP COMPANY, INC., *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the District of Massachusetts.

Before:

WOODBURY, *Chief Judge*, and
HARTIGAN and ALDRICH, *Circuit Judges.*

GEORGE P. DONOVAN, *for appellant.*

LEO F. GLYNN, *for Luckenbach Steamship Company, Inc., appellee.*

Opinion of the Court

On Petition for Rehearing

June 10, 1960

ALDRICH, *Circuit Judge*:

Plaintiff has filed a petition for rehearing, citing the case of *Rich* v. *Ellerman & Bucknall S.S. Co., Ltd.*, decided

by the Court of Appeals for the Second Circuit a day after the instant case, —— F. 2d ——. In *Rich*, the stevedores loading the ship left some of the stow a "dangerous working platform" in the hold, which gave way when the plaintiff longshoreman stepped on it. The decision that a portion of the ship may be made unseaworthy by an act of a stevedore presents no novel principle. It is quite another step to say, as plaintiff does, that because a stevedore may have made negligent use, or negligent choice,* of equipment in which it is bringing freight aboard, the ship becomes unseaworthy. The possible transitory nature of a condition of unseaworthiness has been accented since our opinion herein. *Mitchell* v. *Trawler Racer, Inc.*, May 16, 1960. —— U. S. ——. But we do not believe that unseaworthiness is to be equated with mere negligent conduct. If a winchman employed by a stevedore negligently lowered a boom onto a longshoreman, it would be true, in a sense that the longshoreman had not been working in a safe place. But absent a showing that the winchman was an unfit individual we could not say that the vessel was unseaworthy.

The petition for rehearing is denied.

---

* While we held that the jury might have found that the rolls were inadequately made fast to the board, the statement in our opinion about negligent choice of a wrong type of board was cumulative only. Our primary holding as to that aspect of the case was that there was no evidence warranting a finding that it was the wrong type of board.

APPENDIX D

JUDGMENT

May 11, 1960

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

/s/ ROGER A. STINCHFIELD
Clerk

Approved:

/s/ PETER WOODBURY
Ch.J.

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FILED
OCT 6 1960
Clerk

Supreme Court of the United States.

October Term, 1960.

No. 396.

FRANK ARENA, Petitioner,

v.

LUCKENBACH STEAMSHIP COMPANY, INC., Respondent.

BRIEF OF RESPONDENT LUCKENBACH STEAMSHIP COMPANY, INC. IN OPPOSITION TO PETITION FOR CERTIORARI.

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Supreme Court of the United States.

OCTOBER TERM, 1960.

No. 396.

FRANK ARENA, PETITIONER,

v.

LUCKENBACH STEAMSHIP COMPANY, INC.,
RESPONDENT.

BRIEF OF RESPONDENT LUCKENBACH STEAMSHIP COMPANY, INC., IN OPPOSITION TO PETITION FOR CERTIORARI.

Opinions Below.

A civil action was filed in the United States District Court for the District of Massachusetts by Frank Arena, a longshoreman, alleging a count for negligence and a count for unseaworthiness against the defendant vessel owner, Luckenbach Steamship Company, Inc. Luckenbach impleaded as a third-party defendant the plaintiff's employer, American Stevedoring Corporation, the stevedoring contractor for the vessel. At the trial, at the close of the plaintiff's evidence, the defendant, Luckenbach, filed a motion for a directed verdict. The Court heard arguments by counsel and questioned counsel extensively (P.

82-96). The Court then granted the motion, stating the reasons fully (R. 82-96), and entered judgment for the defendant. The plaintiff appealed.

The Court of Appeals for the First Circuit sustained the District Court by its opinion, which appears at page 19 of the petition. Upon a petition for rehearing by the appellant, the Court of Appeals received the appellant's further brief and again affirmed the opinion previously filed by an additional opinion, which appears at page 25 of the petition.

Jurisdiction.

The complaint alleges a maritime cause of action for negligence and unseaworthiness. Jurisdiction is founded on Article 10 of the Amendments of the Constitution of the United States and Title 28 U.S.C. Sections 1291, 1254(1) and 2101(c).

Questions Presented.

The question before the Court is seemingly the same as before the District Court and the Court of Appeals for the First Circuit: whether the evidence in its aspect most favorable to the plaintiff supported a cause of action against the defendant.

Statute Involved.

There are no statutes involved in the action.

Statement of the Case.

On April 1, 1957, a gang of longshoremen employed by American Stevedoring Corporation, an independent steve-

doring contractor, were loading paper rolls from the pier into a lower hold of the SS. MATTHEW LUCKENBACH (R.A. 18). The vessel was owned by the respondent Luckenbach Steamship Company, Inc., and its entire stevedoring operations were being performed by American Stevedoring Corporation. The longshoremen were using the same method of loading the rolls of paper which had been used in the Port of Boston for many years (R.A. 24, 48). Thirty loads had been handled in the same manner on the day in question without incident prior to the occurrence of the petitioner's injury (R.A. 76).

The drafts had all been handled in the same manner as follows: Five rolls of paper, 2½ feet in diameter by 5 feet in height, were placed on their sides on a slatted wooden platform called a "cargo board"* (R.A. 57; Pl. Ex. No. 2). Three of the rolls were on the first layer and the other two were over them in the two creases (R.A. 57). The dimensions of the board were 5 feet by 8 feet (R.A. 42). At the 5-foot ends of the board were square-shaped nets (R.A. 99; Pl. Ex. No. 2). At each of the 8-foot sides were two manila ropes (four in all) used for lifting the board on the cargo hook (R.A. 62). These ropes were called "lanyards" and were on the sides of the boards (R.A. 46, 62). Before each load was lifted from the apron of the pier the two nets at the ends of the board were tied together with lines, called "board lines," and the nets were also tied to the lanyards (R.A. 62). The witness Caher referred to the lines tied between the nets as the lanyards (R.A. 78).

At the time of the petitioner's injury the load was made up on the pier in the same manner as the preceding loads (R.A. 62). Nothing unusual was observed about it when

*The boards were owned by the stevedoring contractor and stored on the pier.

it was taken up from the pier (R.A. 62). When it came up to the deck level and was moving toward the hatch, it was moving at the ordinary pace and ordinary speed (R.A. 73). It did not look different from any other load (R.A. 70). When it was near the coaming it was tipped and the rolls fell, injuring the petitioner (R.A. 69). The particular board in use was not identified. No evidence was offered that any part of the board, nets or lines broke.

Argument.

I. THE ISSUES ARE SPECIAL TO THE FACTS OF THIS CASE.

(A) The question of adequacy of evidence is necessarily special to the facts of the particular case. The "questions presented" at page 3 of the petition are framed solely in terms of the special proof in this particular case. An analysis of the petitioner's points of argument further confirms that the issues are not of general significance. With respect to the only legal issue presented—the inadequacy of the petitioner's evidence—the decision of the Court of Appeals and the District Court were clearly correct.

(B) Petitioner's first question and point of argument contends that the nets on the cargo board were not long enough. But no witness testified to that effect. In fact, no witness even mentioned the length of the nets. The very first witness called by the petitioner (St. John) testified in direct examination only that the board and nets in use were the same type which had been used for fourteen years with no evidence of prior incident.

> "The Witness: For that type paper, that was the usual procedure." (R.A. 25.)

Each of the other three witnesses who followed Mr. St. John testified only to the same effect. For the witness Hassett see R.A. 48; the witness Feeney, R.A. 57; the witness Caher, R.A. 76, 79, 81. These are the only four witnesses in the record. Mr. Caher, at page 76, testifies:

> "XQ. That is the kind of board that you always use for paper, is that correct? A. That's correct." (R.A. 76.)

The particular board in use was never identified and no comment concerning its particular condition was made in any way by any witness.

It would seem that the best proof of "reasonable fitness" of a device is successful prior use over a long period of time. Here the petitioner's witnesses not only failed to cite any deficiency in the board, but confirmed that the type of board has been used for many years with no evidence of prior incident. The effect of their testimony is to confirm the requirement of "reasonable fitness" and underscores the inadequacy of the petitioner's proof.

In part of the first point of argument in the petition, at the bottom of page 9, petitioner apparently suggests that the nets had not been tied. Yet petitioner's witness Mr. Feeney, who was the only witness who saw the load at the time it was lifted up from the pier, testified on three separate occasions in the record that the nets were tied together.

> "The Witness [Feeney]: I saw that the lanyards were tied and the board lines were on top of the load." (R.A. 62.)

> "Q. The nets were tied? A. The nets were tied." (R.A. 63.)

Any assumption that the nets were not tied would be in conflict with this express testimony in the record by the only witness who saw the load taken up from the pier.

(C) The petitioner's second question and point of argument again assumes that the nets were not tied. At page 10 of the petition the opening and basic sentence of the second point in the brief reads in part as follows:

> "Assuming without conceding that the nets . . . were not tied . . ."

The witness Feeney, called by the petitioner to describe the load at the time it was taken up, expressly testified at page 62 that—

> "The load was on the board straight, it was even, and it was tied."

He further testified at pages 62 and 63 that "the lanyards were tied" and that the "board lines were on top of the load" and that "the nets were tied."

The witness Caher, who saw the load crossing the deck, testified in considerable detail describing the way the nets were tied by four ropes and concluded by stating:

> "They were all tied? A. Yes." (R.A. 78, 79.)

Any assumption urged by the petitioner that the nets were not tied would be refuted by the petitioner's own witnesses, whose testimony is clear and emphatic on the point.

(D) The petitioner's third question and point of argument contends that the trial court should have received

evidence concerning the use of the so-called "end board" in contrast to the "side board." The trial court was more than willing to receive such evidence, but the petitioner's witnesses would not give it. In fact, the court assisted plaintiff's counsel by phrasing a question for counsel (R.A. 27). Every one of the petitioner's witnesses testified that only the board with the lanyards on the side had been used for this cargo for many years. The witness Hassett, when asked the purpose of the lanyards on the side board, replied that its purpose was "to keep the rolled paper in."

> "Q. Do you know, if you know, the purpose of this rope here which you have described as a lanyard? A. On some particular cargo like roll paper, to keep them in.
>
> "Q. To keep the rolled paper in? A. Yes.
>
> "Q. Now which type, if I have not asked you yet, which board were you using loading and discharging paper in the hold of No. 2 hatch of the MATTHEW LUCKENBACH on April 1, 1957? A. This type.
>
> "Q. This type here with the lanyard on the side? A. It is the only type they use." (R.A. 48.)

The foregoing colloquy was during the direct examination of the witness. In spite of this specific testimony from Hassett and similar testimony from the other three witnesses (St. John, 25; Feeney, 57; Caher, 76, 79, 81), the petitioner suggests that the record on the point is "far from clear," although conceding "there was some proof that it was customary to use the side board." In fact, the proof to that effect was uniform from every one of petitioner's witnesses (R.A. 25, 48, 57, 76).

The evidence concerning custom was not offered by respondent Luckenbach in justification; it was offered

by the petitioner. It represented an apparent attempt by the petitioner to show through witnesses a departure from custom by the board in use. But instead the witnesses testified that the board in actual use was the normal and customary one and had been for many years. None of the witnesses testified to any prior incident or difficulty in the use of the side board during its many years of use.

(E) The petitioner's fourth question and point of argument contends that the ship's officers should have requested the stevedoring contractor to use a different board from that which the stevedoring contractor had been using without incident for many years. Such a proposal answers itself. No evidence was produced in the trial of any deficiency in the equipment and the ship's officers were equally justified in accepting the continued use of a proved procedure provided by the stevedoring contractor.

(F) The petitioner's fifth question and point of argument would emphasize the legal principles concerning adequacy of proof. These principles were unhesitatingly recognized by the Court of Appeals and the District Court, and are fully concurred in by the respondent. But legal principles are not a substitute for evidence. No evidence was offered from any witness of any deficiency in the particular board or in the type of board. Evidence was offered only that the same type of board had been used for many years and no evidence was offered of any prior incident. The Court of Appeals and the District Court necessarily reached the conclusion that the petitioner's evidence did not support a cause of action against the respondent.

II. The issues are not of law.

(A) All of the principles of law which the petitioner urges are fundamental ones. These principles are fully adopted in the opinions of the Court of Appeals and the District Court. These principles may be simply expressed as follows:

(1) That the warranty of seaworthiness applies to equipment brought on board the vessel by the stevedore.

Alaska Steamship Co., Inc., v. *Petterson* (1954), 347 U.S. 396, 47 S. Ct. 601, 1954 A.M.C. 860.

(2) That unseaworthiness created by the stevedore is nonetheless a breach of warranty of seaworthiness.

Alaska Steamship Co., Inc., v. *Petterson* (1954), 347 U.S. 396, 47 S. Ct. 601, 1954 A.M.C. 860.

(3) That the test for breach of warranty of seaworthiness is "reasonable fitness" of the equipment for its intended use.

Mitchell v. *Trawler Racer, Inc.* (1960), 361 U.S. 808, 80 S. Ct. 926, 4 L. Ed. 2d 941.

These are the only points of law which are cited by the petitioner. They are well defined in a number of existing decisions of this Honorable Court and have been recently reaffirmed in a clear and thorough manner.

Mitchell v. *Trawler Racer, Inc.* (1960), 361 U.S. 808, 80 S. Ct. 926, 4 L. Ed. 2d 941.

Only the facts of the present case are new, but that is true of every case. The Court of Appeals after two con-

siderations and the District Court, after hearing witnesses and arguments of counsel conscientiously examined the facts of the present case in the light of the well-established principles to which the petitioner refers. Both courts have adopted these principles of law and have reached the conclusion that the petitioner failed to provide the necessary proof to support a cause of action against the respondent. No new issues of law are presented by the record. There is no conflict between the present case and opinions of this Honorable Court, or opinions in other circuits or opinions in any State Supreme Court. The opinions of the Court of Appeals and the District Court are in complete conformity with well-established judicial decisions of this Honorable Court, other Courts of Appeal and other District Courts of the United States.

Conclusion.

The respondent respectfully submits that the petition should not be granted.

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